

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

76-1595

B
JJS

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA, :
Plaintiff-Appellee, :
-against- :
WILLIAM WESTMORELAND, :
Defendant-Appellant. :
-----x

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
WILLIAM WESTMORELAND
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.



PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET - U.S. District Court

Y OFFENSE PO JUDGE ~~XXXXXX~~ assigned
 Y OFFENSE MO
 DEMEANOR M^s
 FELONY Fel 0208 1 DISTRICT Office

0847
Disp./Sentence

U.S.

vs. WESTMORELAND, WILLIAM

(LAST, FIRST, MIDDLE)

Case Filed
Mo. Da.
04 09 76
No. of Dcts. * 02
Yr. 02
JUVENILE

A
0358 01

Docket No. 1

Date 10-25-76

Case No. 0358

Court 1

Judge 1

Bail 1

Release 1

Fugitive 1

Person Recd. 1

PSA 1

Date 10-25-76

Surety Bond 1

Bail Not Made 1

Counsel 1

Status Changed 1

3rd 1

Pvt. Cust. 1

Other 1

Dismissed 1

Twp. 1

On Government's Motion 1

U.S. TITLE/SECTION

18:656 & 2
18:2113(c) & 2

OFFENSES CHARGED
Embezzlement by bank employee.
Bank robbery.

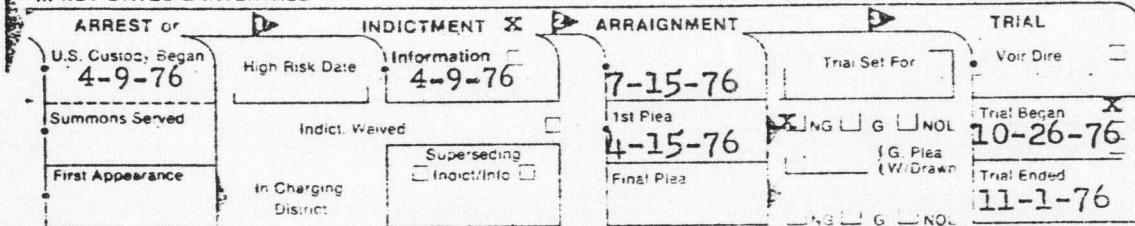
ORIGINAL COUNTS

1,
2

13/17

SUPERSEDED COUNTS

II. KEY DATES & INTERVALS



MAGISTRATE					
SEARCH WARRANT Issued Return	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE ►	INITIAL/NO.	OUTCOME
			PRELIMINARY EXAMINATION OR REMOVAL HEARING		
Summons Issued Served			WAIVED INTERVENING INDICTMENT	Tape Number	DISMISSED HELD FOR GJ OR OTHER PROCEEDING IN THIS DIST. OR HELD FOR GJ OR OTHER PROCEEDING IN DIST. OR BELOW
Arrest Warrant Issued COMPLAINT ►					
OFFENSE (In Complaint)					

U.S. Attorney *John SIFFORD* Defense CJA Ret. Waived Sev. None Other *None*

Alleged Offense
791-1934

* Show last names and suffix numbers of other defendants on same indictment/information.

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) <input type="checkbox"/> (b) <input type="checkbox"/>
4-9-76		Filed indictment.	
4-15-76		Deft. not present. Court directs entry of not guilty plea. Case assigned to Judge Motley. Lasker, J.	
4-30-76		Deft having not appeared..Bench warrant ordered....Motley, J.	
4-30-76		Bench warrant issued.	
7-8-76		Deft appeared. ADJ to 7-15. Execution of B/W stayed until 12: N. 7-15. R.O.R. WARD J.	
7-15-76		DEFT appeared.Court enters plea of NOT GUILTY - B/W vacated. R.O.R. WARD, J	
7-28-76		Filed Govts notice of readiness for trial.	
8-18-76		Deft. and atty. not present, P/T Conf. adj. to 9-8-76, 11 a.m... MOTLEY, J.	
9-13-76		Deft. & Atty. present..P T Conf. held & Concluded, trial adjd to 10-25-76 10 a.m. Rm.1105.....Motley, J.	

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DATE	76Cr.358 (DOCUMENT NO.)	IV. PROCEEDINGS (continued)	PAGE TWO W.Westmoreland	V. EXCLUDABLE DELAY			
				Interval Actual Date	Start Date End Date	LW Code (C)	Total Delays (D)
10-26-76	Jury trial begun...						
10-27-76	Trial cont'd..						
10-28-76	Trial cont'd.						
10-29-76	Trial cont'd.						
11-1-76	Trial cont'd. & concluded..Deft found NOT GUILTY on Ct.1 GUILTY On Ct.2..P.S.I. ordered Sent. adjd to 12-10-76 10 a.m. bail R.O.R.....MOTLEY,J.						
1-3-76	Filed unsecured appearance bond in amt.of \$1,000.						
12-7-76	Atty.Roland Thau present. deft. not having appeared fro a Pre-sentence hearing Court ORDER ISSUANCE OF A B/W ...MOTLEY,J.						
2-9-76	Bench warrant issued....						
2-10-76	Deft (Atty. R.Thau,present) Appeared. B/W Ordered Vacated. Bail Cont'd \$10,000 P.R.B. Sentencing ADJ to 12-17-76 10AM. MOTLEY,J						
2-17-76	Filed Deft's Notice of Appeal to USCA 2nd Circuit from conviction. copy to U.S. Attorney.						
1/21/77	Transcript of record of proceedings dated 10/26/28/76						
1/21/77	Transcript cf record of proceedings dated 10/29 & 11/1/76						

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
[Signature]
By *[Signature]* Deputy Clerk
B

AL:rs

B
76 CRIM. 0358

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA

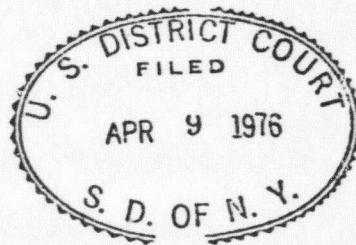
-v-

INDICTMENT

WILLIAM WESTMORELAND and
YOLANDA McLAURIN,

76 Cr.

Defendants.



COUNT ONE

The Grand Jury charges:

On or about the 2d day of July, 1974, in the Southern District of New York, YOLANDA McLAURIN, the defendant, being then an employee of an insured bank, to wit, National Bank of North America, New York, New York, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and WILLIAM WESTMORELAND, the defendant, did, with intent to injure and defraud such bank, wilfully, knowingly and unlawfully, embezzle, abstract, purloin, and misapply moneys, funds and credits of such bank, and moneys, funds, assets and securities intrusted to the custody and care of such bank, and to the custody and care of such employee, to wit, approximately \$20,000.00.

COUNT TWO

The Grand Jury further charges:

On or about the 11th day of July, 1974, in the Southern District of New York, WILLIAM WESTMORELAND and YOLANDA McLAURIN, the defendants, did receive, possess, conceal, barter, sell and dispose of property, money and other things of value exceeding one hundred dollars, to wit, a check drawn on the First National Bank of Hawaii, Number 7081 in the amount of \$20,000. and made payable to the National Bank of North America by Goodwear Dress, Ltd., 1130 Bishop Street, Honolulu, Hawaii, which had been taken and carried away, with intent to steal and purloin while belonging to and in the care, custody, control, management and possession of the National Bank of North America, Far Rockaway, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, knowing that the said check had been taken and carried away from a bank with intent to steal and purloin.

(Title 18, United States Code, Sections 2113(c) and 2.)

Eugene Goldstein
Foreman

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

WILLIAM WESTMORELAND and
YOLANDA McLAURIN,

Defendants.

INDICTMENT

Violation of 18 U.S.C.
§§656, 2113(c) and 2.

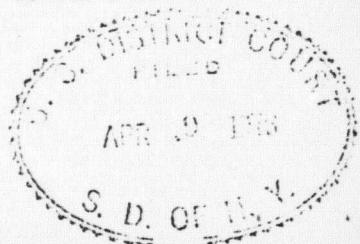
ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Foreman.

FPI-SS-2-19-71-20M-6950



APR 19 1976

4-15-76 Deft not present. Court about entry
of not guilty plea. Case assigned to
Judge Matthew.

Fisher J

4-30-76 DEFT WESTMORELAND NOT HAVING SR
APPEARED. BENCH WARRANT ORDERED.

DEFT McLARIN P/T CONF. HELD & CONCLUDED
ORDERED TO APPEAR BEFORE MAG. FOR ASSIGNMENT
OF COUNSEL. P/T CONF. ON 5-5-76, 9:30 AM.

Matthew J.



MAY 7 1976 DEFT McLarion (City Lawyer) Present, Deft
NOT GUILTY. MOTIONS TO BE FILED, June 4, 1976.
TIME ADDED TO JUNE 30, 1976. DEFT L.E.D.
R.O.R.

Matthew J.

JUN 22 1976 RE: DEF'T McLARIN, AUSA. RW
LEVINE INFORMS COURT THAT ABOVE NAMED DEF'T WILL
BE PROSECUTED IN A DEFERRED PROSECUTION. *McLarion*
RW Matthew J.

10/10 Execution of B/W stayed until
12/11. 7/15 R.O.R. Ward, Jr.

Aug 15, 1976 - Deft appeared (Westmoreland)
Court enters plea of not guilty
B/W vacated. R.O.R. Ward, Jr.

UG 18 1976 DEFT WESTMORELAND AND ANY NOT
PRESENT, P/T CONF AOTO TO 9-8-76, 11 AM

Brothman

(W.A.)

WESTMORELAND

SEP 13 1976 DEFT (Any Person Trial Pres.) P/T CONF.
AND REMAINING, TRIAL AOTO. TO 10-25-76
10 AM RM 1105

Brothman

ORI CIR (RM)

CT 26 1976 DEFT WESTMORELAND ATTORNEY

TRIAL REGUN.

27 1976 TRIAL CONT'D.

T 28 1976 TRIAL CONT'D.

T 29 1976 TRIAL CONT'D.

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NOV 1 1976 TRIAL CONT'D. at ONTARIO 000.

JURY FINDS DEF'T WESTMORELAND
NOT GUILTY ON CT 1, GUILTY ON COUNT
2, P.S.I. ORDERED SENT. AND TO
12-10-76, 10^{AM}, BAIL R.O.R.

Matthew J.
RM

12-7-76

DEF'T WESTMORELAND (ATY ROLLING THRU PRES)
NOT HAVING APPEARED FOR A PRE. SENTENCE
HEARING. COURT ORDERS ISSUANCE OF A B/W.

Matthew J.
RM

12-10-76 DEF'T WESTMORELAND (ATY R. THRU, PRESENT)
APPEARED. B/W ORDERED VACATED.

BAIL CONST. \$10,000 P.R.B. SENTENCING
ADJO TO 12-17-76 10^{AM}

Matthew J.

WESTMORELAND

J

DEC 17 1976 DEF'T (ATY ROLLING THRU PRESENT)
SENTENCED TO 6 YEARS IMPRISONMENT,
E.S.S. DEF'T PLACED ON PROBATION FOR A PERIOD
OF 5 YEARS. S.P.C. CONDITION OF PROBATION. DEF'T
TO MAKE RESTITUTION OF \$20,000 TO MATH. BANK
OF NO. AMERICA

Matthew J.

卷之六

13 || (In open court; jury present.)

14 THE COURT: Suppose you lock the door now,

15 Mr. Marshal, is the outside door locked?

16 THE MARSHAL: Yes.

17 MR. COURT: All right.

18 As I started to say, ladies and gentlemen,
19 first of all I want to thank you for your patience and
20 for your cooperation in being prompt and for the careful
21 attention which you paid to the testimony and the other
22 evidence as it has been received in this case.

Now, I know that in order to serve on this
jury each of you has had to make some personal or business
sacrifice in order to do so, and in that connection I

1 hblk 170

2 want to remind you of something I said earlier and that
3 is that when you serve on a jury you are playing a vital
4 role in the administration of justice and that trial by
5 jury is a basic and cherished institution in our system.

6 In accordance with that, I am sure that any
7 sacrifice which you had to make in order to serve on this
8 jury you were glad to do so in the interests of the fair
9 and impartial administration of justice.

10 Before beginning the charge formally, I
11 would also like to thank counsel on both sides of this
12 case and to congratulate each of them on the high degree
13 of professional skill which each has demonstrated throughout
14 the trial and the vigorous manner in which each has presented
15 his case to the jury.

16 I trust that you will bear with me now,
17 ladies and gentlemen, and give me that same degree of
18 attention which you have given throughout the trial so
19 that you may carefully understand the legal principles
20 which you are to apply to the facts in this case as you
21 find them.

22 The fact that the Government is a party here,
23 that the prosecution is brought in the name of the United
24 States of America entitles it to no greater consideration
25 than that accorded to any other party to a litigation.

1 blk 171

2 By the same token the Government is entitled
3 to no less consideration than that accorded to any other
4 party and that is because under our system all parties,
5 Government and individuals alike, stand equal before the
6 Court.

7 I want to remind you also that every defendant
8 appearing before this Court is entitled to a fair and
9 impartial trial, regardless of his occupation or station
10 in life.

11 The fact that I may refer to some of the
12 testimony or some of the exhibits during the course of
13 this charge does not mean that I think that is the only
14 evidence you should consider or the most important evi-
15 dence. You must consider all the evidence in the case, and
16 you must consider all the testimony, that means the direct
17 examination and the cross-examination of every witness and,
18 as I said before, you have to consider any stipulations
19 and exhibits which are also a part of the evidence.

20 You are not to assume that I have any opinion
21 as to the guilt or innocence of this defendant or as to
22 the truth or falsity of any of the charges made against
23 him in the indictment.

24 As I told you before, in a criminal case
25 that is within the province of the jury only. The fact

1 LELK 172

2 that I have denied motions or granted motions in the course
3 of the trial is not to be taken by you as an indication
4 therefore that the Court believes the defendant to be
5 guilty of any of the charges in the indictment, whether
6 the Court has any view on that matter. These motions
7 and rulings on occasions, as I told you earlier, have to
8 do with questions of law and not questions of fact which
9 are exclusively within your jurisdiction.

10 If, during the course of the trial a question
11 was asked, an objection interposed and I sustained the
12 objection, you are to disregard the question and any
13 alleged facts contained in the question.

14 Similarly, if I ruled that an answer be
15 stricken from the record, you are to disregard both the
16 question and the answer in your deliberations.

17 As I told you before, it is my function to
18 instruct you as to the law applicable to the case and
19 you should accept the law as I state it to you in these
20 instructions and apply it to the facts as you find them
21 and that the logical result of that is an application --
22 is a verdict in the case which must be returned as to each
23 count separately and your verdict as to each count will
24 be either guilty or not guilty and your verdict as to each
25 count again must be unanimous.

1 HLLK 173

2 I want to caution you that you are not to
3 single out any one instruction alone as stating the law,
4 but you must consider these instructions as a whole.

5 As jurors, you are the sole and exclusive
6 judges of the facts. That means that you pass upon the
7 weight of the evidence, you determine the credibility,
8 believability of the witnesses who have testified here.
9 You resolve such conflicts as there may be in the evi-
10 dence and you draw such reasonable inferences as may be
11 warranted by the testimony and the exhibits and the
12 stipulations in the case.

13 Again, with respect to any matter of fact,
14 it is your recollection and yours alone that governs.
15 Anything that counsel for the Government may have said,
16 anything that counsel for defendant may have said or any-
17 thing that I have said or may say which is not in accord
18 with your recollection is not to be substituted by you
19 in lieu of your own recollection as to what the evidence
20 is.

21 On this matter of credibility or believability
22 of the witnesses, as I told you, you are the judges of
23 the credibility of the witnesses and the weight that their
24 testimony deserves. You know, of course, that there is
25 no automatic way to decide who is telling the truth and

1 bblk 174

2 who is not. Credibility can be equated with believability
3 and reliability.

4 If a witness is credible, you say he or she
5 is believable and reliable, if he is incredible, you say
6 he is unbelievable. In other words, there is nothing
7 mysterious about these words.

8 By what yardstick are you to judge the
9 credibility of the witnesses? Again, you can judge the
10 credibility of the witnesses because you saw the witnesses
11 on the witness stand as they testified before you last week
12 and this morning. They were right before you, so that you
13 could look at them and listen to them and observe their
14 manner and demeanor while on the witness stand.

15 Issues of fact are presented as a result
16 of the testimony of the various witnesses for your
17 determination. An issue of fact is presented for example
18 when one witness testifies that a certain event occurred
19 and another witness testifies that it did not occur. Who
20 is to resolve that conflict? The jury. To a large
21 extent, as I have indicated, the resolution of these
22 disputed issues of fact depends on the credibility which
23 the jury attributes to the witnesses and the support or
24 lack of support that each witness received from other
25 testimony and other evidence in the case.

1 hblk 175

2 Again, your duty is to decide the disputed
3 issues of fact and in doing so you use your logic, your
4 reason and your common sense and do not be sidetracked
5 or diverted or distracted by what you consider to be a
6 minor or insignificant detail or irrelevancy or by what
7 you consider to be an appeal, not to your reason or logic,
8 but to mere sentimentality or unthinking passion.

9 I repeat, use your common sense. You should
10 carefully scrutinize all the testimony given. As I said
11 before, both direct and cross-examination, the circumstances
12 under which each witness has testified and every matter in
13 evidence which tends to show whether a witness is worthy
14 of belief.

15 Consider each witness' intelligence, motive,
16 and state of mind and demeanor and manner while on the
17 witness stand; consider the witness' ability to observe
18 the matters as to which he or she has testified and whether
19 he or she impresses you as having an accurate recollection
20 of these matters. Consider also any relation each witness
21 may bear to either side of the case, the manner in which
22 each witness might be affected by the verdict and the
23 extent to which if at all each witness is either supported
24 or contradicted by other evidence in the case.

25 Inconsistencies or discrepancies in the

1 hibit 176

2 testimony of a witness or between the testimony of different
3 witnesses may or may not cause the jury to discredit
4 such testimony. Two or more persons witnessing an incident
5 or a transaction may see or hear it differently and
6 innocent misrecollection like failure of recollection is
7 not an uncommon experience.

8 In weighing the effect of a discrepancy,
9 always consider whether it pertains to a matter of im-
10 portance or an unimportant detail and whether the dis-
11 crepancy results from innocent error or intentional
12 falsehood.

13 In determining credibility and weight to be
14 given to the testimony of any witness, you must give equal
15 consideration to the testimony of the Government witnesses.
16 The mere fact that some of them may be employees of the
17 government entitled them to no more and no less con-
18 sideration than any other witness as I pointed out earlier.
19 Nor should you be influenced by the number of witnesses
20 a side has called or the number of documents received in
21 evidence and that is because we are interested in the
22 quality of the evidence, not the quantity.

23 After making your own judgment, you will
24 give the testimony of each witness such credibility or
25 believability, if any, as you think it deserves.

1 H.H. 177

2 If you find that any witness, and this applies
3 to all witnesses who have testified here, has willfully
4 testified falsely as to any material matter, you may
5 reject the entire testimony of that witness or you may
6 accept such part or portion as commends itself to your
7 belief or which you may find corroborated by other
8 evidence in the case.

9 You are instructed that in weighing the
10 testimony of Government witnesses, you may take into
11 account any motives the witness may have in testifying
12 for the Government. This factor does not disqualify the
13 testimony of any witness, but it may well affect the weight
14 you give to the testimony of a witness in assessing the
15 credibility of that witness.

16 During the course of the trial you heard the
17 testimony of Yolanda McLaurin, a person who testified
18 concerning her own involvement in the two crimes charged
19 in this indictment. Although she is not a defendant
20 actually on trial here, she has been named as a defendant
21 in the indictment and, as I have indicated, she has
22 testified before you concerning her own involvement in the
23 criminal charges made in the indictment. She is therefore
24 called an accomplice.

25 Under the law, as I have indicated, in order

1 rblk. 178

2 for one to be an accomplice, one must be concerned with or
3 having participated in the commission of the crime with
4 which the defendant is charged. In other words, an
5 accomplice must be a participant in that crime.

6 An accomplice does not become incompetent
7 as a witness merely because of participation in the crime
8 charged, but I must point out to you that the testimony
9 of an accomplice is to be weighed with care and scrutiny
10 and it is not to be rejected unless the jury thinks it
11 has no weight. Like any other testimony, it must be con-
12 sidered by you as testimony in the case and checked up
13 with the other evidence in the case and given appropriate
14 weight and judged as to credibility in the same manner that
15 I indicated before, but with this added caution, that in
16 the case of an accomplice you must view it very carefully.

17 Under the rules in the federal court, the
18 testimony of an accomplice alone, if believed by you, may
19 be of sufficient weight to sustain a verdict of guilty
20 even though it is not corroborated or supported by other
21 evidence in the case.

22 Again, you should keep in mind that testimony
23 of an accomplice is always to be received with caution and
24 weighed with great care. The law does not compel the
25 defendant in a criminal case, as I said before, to take

1 Mark 172

2 the witness stand and testify and no presumption of guilt
3 may be raised and no inference of any kind unfavorable to
4 a defendant may be drawn from the defendant's failure to
5 testify in a criminal case.

6 However, a defendant who wishes to testify
7 may do so and if a competent witness. The defendant's
8 testimony is to be judged in the same way as that of any
9 other witness as I have just described.

10 If a potential witness could have been called
11 by the Government or by the defendant and neither side
12 called him, then you may infer that the testimony of the
13 absent witness might have been unfavorable either to the
14 Government or to the defendant or to both of them; but
15 on the other hand, it is equally within your province to
16 draw no inference at all from the failure of either side
17 to call a witness. You should bear in mind, however, that
18 there is no duty upon either side to call a witness
19 whose testimony would appear to be merely cumulative of
20 testimony already in evidence.

21 As you well know, the reason we are here is
22 because the grand jury has returned an indictment against
23 this defendant, charging him with two federal crimes and
24 he has entered a plea of not guilty to each of those
25 crimes. That is why we are here.

1 Hilk 180

2 Consequently, the Government, if the defendant
3 is to be convicted, as I have told you repeatedly now, has
4 the burden of proving to you the jury that the defendant
5 is guilty as to a particular count beyond a reasonable
6 doubt. That is a burden that never shifts in a criminal
7 case. It remains upon the Government throughout the
8 entire trial. A defendant does not have to prove his
9 innocence of any charge. On the contrary, a defendant in
10 a criminal case is presumed to be innocent of any charge
11 made against him in an indictment. This presumption of
12 innocence was in his favor at the start of the trial,
13 continued in his favor throughout the trial and is in his
14 favor even as I instruct you now. It remains in his
15 favor during the course of your deliberations in the jury
16 room as I told you when you were being selected. This
17 presumption of innocence is removed only if and when after
18 your deliberations in the jury room you come to the
19 conclusion that the Government has sustained its burden
20 of proof and that is to prove the defendant guilty of a
21 particular charge beyond a reasonable doubt.

22 The question that naturally comes up is what
23 is a reasonable doubt? The words almost define themselves.
24 Reasonable doubt is a doubt founded in reason and arising
25 out of the evidence in the case or the lack of evidence.

1 HILK 161

2 It is a doubt which a reasonable person has after carefully
3 weighing all the evidence, the kind of doubt which would
4 make one hesitate to act. It means a doubt that is sub-
5 stantial and not merely shadowy.

6 Reasonable doubt is one which appeals to your
7 reason, your judgment, your common sense and your experiences
8 in life. It is not caprice, whim or speculation. It is
9 not a excuse to avoid the performance of an unpleasant
10 duty. It is not sympathy for a defendant.

11 If after a fair and impartial consideration
12 of all the evidence, you can candidly and honestly say
13 that you are not satisfied of the guilt of this defendant
14 as to a particular charge which you are then considering,
15 and that you do not have an abiding conviction as to this
16 defendant's guilt, such a conviction as you would be
17 willing to act upon unhesitatingly in important and weighty
18 matters in the personal affairs of your own life, then
19 you have a reasonable doubt and in that circumstance it
20 is your duty to acquit the defendant of that particular
21 charge.

22 On the other hand, if after such a fair and
23 impartial consideration of all the evidence, you can candidly
24 say that you are satisfied of the guilt of this defendant,
25 that you do have an abiding conviction as to this

1 HBLK 182

2 defendant's guilt, such a conviction as you would be
3 willing to act upon unhesitatingly in important and weighty
4 matters in the personal affairs of your own life, then you
5 have no reasonable doubt and in that circumstance you may
6 convict the defendant of that particular count.

7 A reasonable doubt does not mean a positive
8 certainty or beyond all possible doubt. That is because
9 it is practically impossible for a person to be absolutely
10 and completely convinced of any controverted fact which
11 by its nature is not susceptible to mathematical certainty.
12 In consequence, the law in a criminal case is that it is
13 sufficient if the guilt of a defendant has been established
14 beyond a reasonable doubt, not beyond all possible doubt.

15 There are two classes of evidence recognized
16 and accepted in courts of justice upon either of which you
17 may find an accused guilty of a crime. One is called
18 direct evidence, the other is called circumstantial
19 evidence.

20 Direct evidence tends to prove the fact in
21 dispute without need for any other amplification, although,
22 of course, there is always the question whether that
23 evidence is to be believed.

24 Circumstantial evidence, on the other hand,
25 tends to show other facts from which the fact in dispute

1 HLIB - 183

2 may reasonably be inferred. In other words, it is that
3 evidence which tends to prove the fact in issue by proof
4 of other facts which have a legitimate tendency to lead
5 the mind to infer that the facts sought to be established
6 are true.

7 Circumstantial evidence consists of facts
8 proved from which the jury may infer by a process of
9 reasoning other facts in dispute. In other words, it is
10 not necessary that the participation of a defendant always
11 be shown by direct evidence. The defendant's connection
12 to a crime charged may be inferred from such facts and
13 circumstances in evidence as would legitimately tend to
14 support that inference. Knowledge, willfulness, and
15 intent of a defendant need not be proved by direct evi-
16 dence. Like any other fact in issue, or in dispute, it
17 may be established by circumstantial evidence.

18 In every criminal case it is necessary for
19 the Government to prove beyond a reasonable doubt that
20 a defendant on trial had the necessary criminal knowledge,
21 willfulness and intent to commit the crime.

22 Questions concerning a defendant's knowledge,
23 willfulness and intent involve proof of a defendant's
24 state of mind at the time of the alleged crime. It is
25 obviously impossible to prove directly the operation

1 KLIK 184

2 of a person's mind because you cannot look into a
3 person's mind and see what his or her intentions are or
4 were. But proof of the circumstances surrounding a
5 defendant's activities may well supply an adequate and
6 convincing basis for finding that a defendant acted
7 knowingly, willfully and intentionally.

8 In other words, the actions of a defendant
9 must be judged in their time and place just as the full
10 meaning of a word is commonly understood only in relation
11 to other words in a sentence or in its context. So the
12 meaning of a particular act or conduct on the part of a
13 defendant may depend upon the circumstances surrounding
14 that act or conduct.

15 In determining the issue of knowledge, willful-
16 ness and intent of a defendant, you are entitled to consider
17 any statements made by the defendant which are in evidence
18 and any acts done by the accused which are in evidence
19 and all other facts and circumstances in evidence which
20 may aid you in determining the defendant's state of mind.

21 You may consider such things as the age,
22 background, occupation and experience of a defendant and
23 whether such facts make it likely or unlikely, probable
24 or improbable that a defendant fully and precisely under-
25 stood what he was doing in regard to a transaction and

1 hbk 185

2 where relevant, in relation to others.

3 In order to convict a defendant on any count,
4 as I have said, you must find beyond a reasonable doubt
5 that he acted unlawfully, knowingly and willfully.

6 These words are going to be used throughout and so I am
7 going to define them for you at this time and they are
8 applicable to both charges in the indictment.

9 Unlawfully obviously means contrary to law.

10 An act is done knowingly if it is done voluntarily and
11 purposefully and not because of mistake, accident, mere
12 negligence or other innocent reason. An act is done
13 willfully if it is done knowingly, deliberately, in-
14 tentionally and with an evil motive or purpose in mind.

15 In determining whether a defendant has acted
16 willfully, it is not necessary for the Government to prove
17 that the defendant knew that he was breaking any particular
18 federal law or any particular rule. It must, however,
19 prove a bad purpose or motive on the part of a defendant
20 and, as I have said, knowledge and willfulness and intent
21 of a defendant need not be proved by direct evidence
22 like any other fact in issue, it may be established by
23 circumstantial evidence.

24 As I told you when you were being selected
25 and before the trial commenced, an indictment is not proof

1 LMK 136

2 or evidence. It is merely an accusation. It is a
3 technique or method or procedure which we employ in our
4 system whereby persons are accused by a grand jury of
5 crimes or a crime and then they are brought into a court-
6 room where their guilt or innocence is announced by a trial
7 jury such as you are, after hearing the evidence.

8 Therefore, the indictment has no evidentiary
9 value and should not be considered by you as proving or
10 tending to prove the crime charged.

11 As I told you, the Government has the burden
12 of proving the crime charged beyond a reasonable doubt.
13 That is why we are here. What I am going to do is to read
14 each charge to you and then I am going to tell you what
15 the elements are of each charge which you must find the
16 Government has proved beyond a reasonable doubt before
17 you can find the defendant guilty. Then I am going to
18 tell you under what circumstances the defendant must be
19 acquitted.

20 The indictment with respect to count one
21 cites in parenthesis below that count, two federal statutes.
22 The first is Title 18, United States Code, Section 656 and
23 the other is Title 18, United States Code, Section 2.
24 Those are the two laws that are charged here with having
25 been violated by the defendants and the defendants, as you

bb/k 187

1 know, are William Westmoreland and Yolanda McLaurin.

2 Of course, only Mr. Westmoreland is on trial before you,
3 as I said before, and he is the only one whose guilt or
4 innocence you are to announce in your verdict, but, of
5 course, in doing so, you will have to consider the actions
6 of Yolanda McLaurin in deciding whether he is guilty of
7 the crimes charged.

8 Title 18, United States Code, Section 656,
9 the first statute cited, makes it a crime for a bank
10 employee to embezzle bank funds or funds belonging to
11 others left in the bank's custody when the bank's funds
12 are insured by a federal agency.

13 The defendant William Westmoreland is charged
14 in Count 1, along with Yolanda McLaurin, with the crime
15 of bank embezzlement by a bank employee and I am going to
16 read that to you now.

17 "Count 1. Grand jury charges on or about the
18 second day of July, 1974 in Southern District of New York,
19 Yolanda McLaurin, the defendant, being then an employee
20 of an insured bank, to wit, National Bank of North
21 America, New York, New York, the deposits of which were
22 insured by the Federal Deposit Insurance Corporation and
23 William Westmoreland, the defendant, did with intent to
24 injure and defraud such bank willfully, knowingly and
25 unlawfully embezzle, abstract, purloin and misapply

1 HBlik 188

2 moneys, funds and credits of such bank and moneys, funds,
3 assets and securities entrusted to the custody and care of
4 such bank and to the custody and care of such employee, to
5 wit, approximately \$20,000."

6 It is the Government's claim as to Count 1,
7 that Mr. Westmoreland is guilty of bank embezzlement by a
8 bank employee because he aided and abetted the embezzle-
9 ment by Yolanda McLaurin who was a bank employee of the
10 commission of the crime. Therefore in order to convict
11 defendant Westmoreland of Count 1, you must first find
12 that a bank employee committed the crime and that Westmore-
13 land aided and abetted its commission.

14 I am going to read those statutes to you.

15 The first one, as I said, is 656 and that reads in perti-
16 nent part as follows:

17 "Whoever being an employee of any insured bank
18 embezzles, abstracts, purloins or willfully misappropriates
19 any of the moneys, funds or credits of such bank or any
20 moneys, funds, assets or securities entrusted to the
21 custody or care of such bank commits an offense against
22 the United States which is punishable as a crime."

23 The second statute, Title 18, United States
24 Code, Section 2 referred to in Count 1 is known as the
25 aiding and abetting statute of the United States and that

1 hblk 189

2 reads as follows:

3 "Whoever commits an offense against the
4 United States or aids, abets, counsels, commands, induces
5 or procures its commission is punishable as a principal.
6 Whoever willfully causes an act to be done which if directly
7 performed by him or another would be an offense against
8 the United States, is punishable as a principal."

9 In sum, then, the first count charges that
10 the defendant William Westmoreland unlawfully, willfully
11 and knowingly aided and abetted Yolanda McLaurin, a bank
12 employee, to embezzle and misapply \$20,000 of the bank's
13 funds or funds in the custody and care of the bank.

14 The first count, of course, also alleges
15 that the deposits of the bank were insured by the Federal
16 Deposit Insurance Corporation which is what makes this
17 federal case and that this embezzlement took place in part
18 here in Manhattan which is a part of the Southern District
19 of New York.

20 As I told you, Mr. Westmoreland and Miss McLaurin
21 are both named in Count 1 of the indictment. However,
22 Miss McLaurin is not now on trial before you. Therefore
23 you are to return a verdict on Count 1 only as to Mr.
24 Westmoreland.

25 However, while it is only the guilt or

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1 || Elik 190

2 innocence of Mr. Westmoreland that will be announced by
3 you in your verdict, you must first determine if Yolanda
4 McLaurin, while a bank employee, committed the acts she
5 is charged with in the indictment. You must then decide
6 whether Mr. Westmoreland is guilty of having aided and
7 abetted her in the embezzlement.

Consequently, in order to find Mr. Westmoreland guilty as charged in Count 1, you must find that the Government has proved beyond a reasonable doubt each of the following elements as to Yolanda McLaurin.

12 First that on or about the second day of
13 July, 1974, here in the Southern District of New York,
14 Yolanda McLaurin was an employee of the National Bank
15 of North America.

23 Fourth, that Yolanda McLaurin acted unlaw-
24 fully, willfully and knowingly.

I shall now discuss each of these elements.

1 hibit 191

2 in a little greater detail.

3 The first element of the offense which you
4 must find beyond a reasonable doubt is that Yolanda Mc-
5 Laurin was an employee of the National Bank of North
6 America on July 4, 1974. You have heard testimony to
7 that effect during this trial and it is, of course, up
8 to you, the jury, to find that this element has been
9 proved beyond a reasonable doubt.

10 The second element which you must find and
11 an element which makes this a federal offence is that
12 the National Bank of North America was a federally in-
13 sured bank at the time. The parties have stipulated that
14 the banks funds were insured by the Federal Deposit
15 Insurance Corporation. This means that the Government
16 was not obliged to produce a witness here to so testify,
17 but you must nevertheless find that this element of the
18 crime has been proved beyond a reasonable doubt.

19 It is not necessary for you to find the de-
20 fendant knew that the bank was so insured.

21 The third element which you must find beyond
22 a reasonable doubt is that Yolanda McLaurin embezzled
23 or misapplied a check which belonged to the bank or was
24 entrusted to the bank for which she worked. To embezzle
25 means that in this case you must find Yolanda McLaurin

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2 received the check lawfully by virtue of her position with
3 the bank but then took this check from the bank and con-
4 verted it to her own or another's use in violation of
5 the bank's trust in her. The Government has the burden
6 of proving beyond a reasonable doubt that she did indeed
7 embezzle these funds.

8 The fourth element which you must find beyond
9 a reasonable doubt is that Yolanda McLaurin acted unlaw-
10 fully, knowingly and willfully. I have already discussed
11 the meaning of these terms for you and I told you they
12 apply to both these cases.

13 Now, if you find that the Government has
14 failed to prove any one of these four elements beyond a
15 reasonable doubt as to defendant McLaurin, then you must
16 find that the Government has failed to prove the crime of
17 bank embezzlement by a bank employee of a federally
18 insured bank.

19 On the other hand, if you find that the Govern-
20 ment has proved each of these four elements beyond a
21 reasonable doubt, then you will conclude that the Govern-
22 ment has carried its burden of proving bank embezzlement
23 by a bank employee of a federally insured bank. If you so
24 conclude, you must then consider whether the Government
25 has carried its burden of proving that the defendant, who

1 hblk 193

2 is now on trial, Mr. Westmoreland, aided and abetted this
3 embezzlement beyond a reasonable doubt.

4 You remember a few moments ago I read to you
5 the aiding and abetting statute but I will read it again
6 at this time. And that statute says, "Whoever commits an
7 offense against the United States or aids, abets, counsels,
8 demands, induces or procures its commission is punishable
9 as a principal. Whoever willfully causes an act to be done
10 which if directly performed by him or another would be an
11 offense against the United States is punishable as a
12 principal."

13 Accordingly, you may find a defendant guilty
14 of a substantive crime charged in an indictment if you find
15 beyond a reasonable doubt that another person actually
16 committed the offense and that the defendant who is on
17 trial before you aided and abetted the commission of
18 that offense or caused the offense to be committed.

19 There is no precise rule as to what acts a
20 defendant must perform in order to be found by a jury to
21 be an aider or abettor. It is enough if you find that a
22 defendant knowingly associated himself in some manner
23 with the illegal venture, actually participated in it as
24 something which he wished to bring about, or that he
25 sought by his actions to make succeed or that he caused

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2 Miss McLaurin to commit the crime. In this connection
3 you may also consider whether the defendant had a stake
4 in the venture.

5 In other words, the law is that one who aids
6 and abets another or causes another to commit an offense
7 with knowledge of the unlawful nature of the offense is
8 just as guilty of that offense as if he had committed the
9 offense himself.

10 To find a defendant guilty of aiding and
11 abetting, you must of course find something more than
12 mere knowledge on his part that a crime was being committed.
13 Thus a mere spectator at a crime is not a participant, he
14 cannot be found to be an aider and abettor.

15 Consequently, in order to find a defendant
16 guilty of aiding and abetting, you must find that the
17 defendant with knowledge of the unlawful purpose in some
18 way associated himself with the illegal activity, that he
19 participated knowingly in it as something he wished to
20 bring about, that he knowingly by his actions endeavored
21 to make it succeed or that he knowingly caused an illegal
22 act to be done.

23 Now, again, if you find that the Government
24 has failed to establish beyond a reasonable doubt any
25 one of the four elements of the crime charged in Count 1,

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2 as I have just enumerated and discussed those elements for
3 you or that the defendant has not aided or abetted Yolanda
4 McLaurin in the commission of that offense, then you must
5 find the defendant not guilty of the crime charged in
6 Count 1.

7 On the other hand, if you should find beyond
8 a reasonable doubt that the Government has sustained its
9 burden of proving each and every one of the four elements
10 of the crime charged in Count 1 as to Yolanda McLaurin, as
11 I have just enumerated and discussed, and if you find that
12 in addition, as I have just charged you, that the defendant
13 Westmoreland aided and abetted Yolanda McLaurin in the
14 embezzlement, then you may convict the defendant of this
15 charge.

16 Now, I am going to read you the second count
17 of the indictment and similarly discuss the elements of
18 that charge.

19 "The grand jury further charges on or about
20 the 11th day of July, 1974 in Southern District of New
21 York, William Westmoreland and Yolanda McLaurin, the
22 defendants, did receive, possess, conceal, barter, sell
23 and dispose of property, money and other things of value
24 exceeding \$100, to wit, a check drawn on the First National
25 Bank of Hawaii, number 7081 in the amount of \$20,000 and

1 RBLK 196

2 made payable to National Bank of North American by Goodwear
3 Dress Limited, 1130 Bishop Street, Honolulu, Hawaii, which
4 had been taken and carried away with intent to steal and
5 purloin while belonging to and in the care and custody,
6 control, management and possession of the National Bank
7 of North America, Far Rockaway, New York, a bank, the
8 deposits of which were then insured by the Federal Deposit
9 Insurance Corporation, knowing that the said check had
10 been taken and carried away from a bank with intent to
11 steal and purloin."

12 In this case the indictment cites Title 18,
13 United States Code, Sections 2113(c) and Title 18, United
14 States Code, Section 2.

15 With respect to Title 18, United States Code,
16 Section 2113(c), that statute provides in relevant part
17 as follows:

18 "Whoever possess property, money or other thing
19 of value knowing the same to have been taken from a bank
20 in violation of subsection B shall be guilty of a
21 crime."

22 Now, subsection B provides that:

23 "Whoever takes and carries away with intent
24 to steal any property, money or other thing of value
25 exceeding \$100 belonging to or in the care, custody or

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2 control of any bank is guilty of a crime."

3 Then section F of the same statute defines
4 a bank as any bank the deposits of which are insured by
5 the Federal Deposit Insurance Corporation.

6 In other words, the defendant Westmoreland
7 is charged in Count 2 with having in his possession a
8 check which he knew had been stolen from a bank and which
9 he knew had been in the care, custody or control of the
10 bank or which belonged to the bank.

11 In order for you to find the defendant guilty
12 of the second count, you must find that the Government has
13 proved as to him each of the following four elements:

14 First, that the \$20,000 check which is in
15 evidence, I believe that is Government's Exhibit 7, be-
16 longed to the bank or was in its care, custody or con-
17 trol.

18 Second, that the check had been taken and
19 carried away from the bank by Miss McLaurin with intent
20 to steal that check.

21 Third, that the bank in question, the
22 National Bank of North America, was insured by the Federal
23 Deposit Insurance Corporation when the check was taken
24 with intent to steal.

25 Fourth, that the defendant unlawfully and

1 193. Habit

2 willfully possessed the check knowing it to have been
3 stolen while it was in the care, custody or control of
4 the bank or belonged to the bank.

5 Again, I will discuss these elements in a
6 little greater detail.

7 The first element, the check belonged to the
8 bank or was in the care, custody or control of the bank,
9 simply means that this check was the property of the bank
10 or was entrusted to the bank by the sender and that the
11 bank possessed the check at the time it was taken away
12 with intent to steal.

13 The second element is that this check was
14 taken and carried away from the bank with intent to steal
15 the check from the bank. This means that you must find
16 that someone physically took and carried away the check
17 in question with the intent in mind to steal. In this
18 case, the Government contends that Yolanda McLaurin took
19 and carried away a \$20,000 check from the National Bank of
20 North America with intent to steal the check. The taking
21 and carrying away is itself explanatory and simply means
22 that the check was removed from the bank's control.

23 Any degree of taking is taken as sufficient
24 under this section. The crucial aspect is that the actions
25 of Miss McLaurin with respect to this check were clearly

1 able... 190

2 inconsistent with the bank's continued control over it.

3 I have already described what is required to
4 prove the third element of the offense, namely that the
5 deposits were insured by the Federal Deposit Insurance
6 Corporation and I again remind you that there is a
7 stipulation that this bank was so insured.

8 The fourth element is that Westmoreland
9 unlawfully and willfully possessed a check which he knew
10 had been stolen from the bank and was in its care, custody
11 or control or belonged to the bank.

12 It is not necessary to prove that Westmoreland
13 or McLaurin knew that this particular bank was insured
14 by the Federal Deposit Insurance Corporation. It is not
15 necessary to prove that Westmoreland actually participated
16 in taking the check or actually physically took it from
17 the bank. If you are convinced beyond a reasonable doubt
18 that the defendant knew that the check had been stolen
19 from the bank and that the check was in its care, custody
20 or control or belonged to it when it was stolen, then this
21 fourth element has been satisfied.

22 Unlawful possession means that he had no
23 legal right to have the check in his possession. Although
24 a check may have been stolen, it may still be in a person's
25 lawful possession. For example, a stolen check may be

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2 lawfully in the possession of an FBI agent who has just
3 recovered it from a thief. Willful possession means that
4 he knowingly had the check in his possession.

5 Now, the law recognizes two kinds of possession:
6 Actual possession and constructive possession.

7 A person who knowingly has direct, physical
8 control over a thing at a given time is then in actual
9 possession of it. A person who, although not in actual
10 possession of a thing, has both the power and intention
11 at a given time to exercise dominion or control over a
12 thing either directly or through another person or
13 persons, is then said to be in constructive possession of
14 a thing.

15 Because you cannot look into a person's
16 mind to determine what he knew at a particular time, the
17 only way for you to determine whether this defendant now
18 on trial knew that the check was stolen at the time he
19 possessed it and was in the custody, care or control of
20 the bank, whether he knew those facts, is for you to take
21 into consideration all the testimony and other evidence
22 which will aid you in this determination. As I said before,
23 direct proof of knowledge is not necessary because know-
24 ledge if it cannot be proved directly may be inferred from
25 all the facts and circumstances in evidence.

1 1111-201

2 if the Government has failed to establish
3 beyond a reasonable doubt any one of the four elements of
4 the second charge in this indictment as I have just
5 enumerated and discussed them for you as to this defendant,
6 then you must find the defendant not guilty of the crime
7 charged.

8 On the other hand, if you should find that the
9 Government has sustained its burden of proving each and
10 every one of these four elements as to this defendant,
11 then you may -- beyond a reasonable doubt, that is --
12 then you may convict the defendant of the second charge.

13 Now, as in the case of the first charge,
14 it is the Government's theory that if you find that the
15 Government has failed to prove every one of those four
16 elements as to the defendant Westmoreland, he can still
17 be convicted as an aider and abettor and it is the
18 Government's theory that you can find that the defendant
19 Yolanda McLaurin is guilty of the crime charged in Count 2
20 and that it has proved all the four elements of Count 2
21 as to her and that you can find from the evidence in the
22 case that the defendant Westmoreland aided and abetted
23 Miss McLaurin in the commission of the crime charged in
24 Count 2.

25 So that in order to find the defendant

1 Hilk 262

2 Westmoreland guilty of aiding and abetting under this
3 count, you must first find that Yolanda McLuarin committed
4 the crime charged in Count 2. That is, that the Government
5 proved all the elements beyond a reasonable doubt as to
6 her and then you must consider, as I instructed you before,
7 whether Westmoreland knowingly aided and abetted her with
8 respect to the commission of the crime charged in
9 Count 2.

10 I have already charged you as to aiding and
11 abetting and how you can find one is an aider and abettor
12 and that applies to this count at this point

13 Conduct of a defendant, including statements
14 which are knowingly made by him upon being informed that
15 a crime has been committed or that he has been accused
16 of a crime, may be considered by the jury in the light of
17 all the other evidence in the case.

18 When a defendant voluntarily and intentionally
19 offers an explanation or makes some statement tending to
20 show his innocence of a crime and such explanation or
21 statement later proved to be false, the jury may consider
22 whether this circumstantial evidence points to a
23 consciousness of guilt on the part of the defendant making
24 the statement.

25 Ordinarily it is reasonable to infer that an

1 RELLI 283

2 innocent person would not have found it necessary to
3 fabricate an explanation or to make up a story which
4 would establish his innocence. Whether or not evidence
5 as to a defendant's voluntary explanation or statement
6 points to a consciousness of guilt and the significance
7 to be attached to any such statement are matters ex-
8 clusively within the province of the jury.

9 There has been evidence in this case con-
10 cerning an August, 1975 check written by the defendant on
11 a closed account and that evidence has been received in
12 evidence for the limited purpose of shedding light or
13 such light as it may on the defendant's intent. You
14 recall that I instructed you at the time that evidence
15 was received and that you were to consider it only with
16 respect to the defendant's intent with respect to the
17 alleged events of 1974 charged in the indictment.

18 I want to point out again, the defendant is
19 not on trial here for having written a check in August,
20 1974 which bounced, nor may you use that as evidence or
21 proof of a propensity by the defendant to embezzle bank
22 funds or illegally possess a stolen bank check. You may
23 consider it as I have said only on the issue of intent
24 to commit the crimes charged in the instant indictment and
25 for that limited purpose only.

1 KBLK 204

2 If you have a reasonable doubt that the
3 defendant embezzled the bank funds or aided and abetted
4 his co-defendant Yolanda McLaurin in doing so, or if you
5 have a reasonable doubt that he possessed the bank check
6 or aided and abetted its possession as charged in Count 2,
7 then, of course, the alleged subsequent similar act
8 becomes irrelevant to your deliberations and you should
9 not consider it and you should acquit the defendant.

10 If you have a reasonable doubt that the
11 defendant proposed, prepared or assisted the scheme testi-
12 fied to by the witness Yolanda McLaurin, you must acquit
13 him even though it be proved and the defense admits that
14 this defendant derived a monetary benefit from McLaurin's
15 criminal conduct. The defendant may be found guilty
16 of embezzlement only if you should find beyond a reasonable
17 doubt that he was actually involved in the alleged scheme
18 and aided and abetted the defendant or witness McLaurin
19 in her depositing of that check in his account.

20 The evidence concerning the defendant's
21 spending of the money after it appeared in his account
22 may be probative of the question whether he did scheme
23 to have it deposited in his account. Thus, if you have a
24 reasonable doubt that the defendant proposed the plan to
25 Yolanda McLaurin, discussed such a plan with her, gave her

1 hbik 203

2 a deposit slip, held Exhibit 7, you should find him not
3 guilty even though he drew on the account.

4 This is so even if you should feel the
5 defendant knew that he had never deposited the \$20,000
6 into his account and that the funds were in there by some
7 error. You may find the defendant's failure to inquire
8 at the bank unusual and you may consider that failure to
9 inquire probative of whether he knew of the alleged
10 scheme, but you may not convict him solely because he
11 failed to inquire before spending the money unless you find
12 in addition beyond a reasonable doubt that the defendant
13 is guilty as I have instructed you as to Counts 1 and 2.

14 The jury is not to consider or in any way to
15 speculate about the punishment which a defendant may
16 receive if he is found guilty and that is because the
17 function of a jury is to determine the guilt or innocence
18 of a defendant on the basis of the evidence and the
19 Court's instructions as to the law, so that during the
20 course of your deliberations you are not to discuss any
21 possible punishment which a defendant may receive, be-
22 cause that is not the jury's function to impose punish-
23 ment. The jury's function is to determine whether the
24 defendant is guilty or not guilty and then it is for the
25 Court alone that has the duty of determining what the

1 Mblk 206

2 sentence will be, if there is a conviction.

3 Now, the most important part of this case
4 is the part which you as jurors are now about to play,
5 ladies and gentlemen, because it is for you and you alone
6 to decide whether the defendant is guilty or not guilty
7 as to each count of the indictment. I know you will try
8 the issues that have been presented to you according
9 to the oath which you have taken as jurors. In that
10 oath you promised that you would well and truly try the
11 issues joined in this case and a true verdict render.

12 I suggest to you that if you follow that oath
13 and try the issues without combining your thinking with
14 any emotions, you will arrive at a true and just verdict.
15 However, it must be clear to you that once you get into an
16 emotional state and let fear or prejudice or bias or
17 sympathy interfere with your thinking, then you will not
18 arrive at a true and just verdict.

19 As you approach the performance of your
20 function in this case, therefore, the determination of
21 the guilt or innocence of this defendant, please
22 remember that it is your duty to weigh the evidence
23 calmly and dispassionately without sympathy or prejudice
24 for or against either the Government or the defendant.
25 And as you deliberate, ladies and gentlemen, please be

1 HJM 107

2 carefully to listen to the opinions of other jurors as well
3 as to ask for an opportunity to express your own views. No
4 one juror holds the center stage in the jury room and no
5 one juror may control or monopolize the deliberations.

6 If after listening to your fellow jurors, and
7 if after stating your own view, you become convinced that
8 your view is wrong, do not hesitate because of stubbornness
9 or pride of opinion to change your view.

10 On the other hand, do not surrender your honest
11 conviction solely because of the opinion of your fellow
12 jurors or because you are outnumbered.

13 When you retire to the jury room to deliberate,
14 you may send for any exhibits you desire to see or have
15 any of the testimony read back. You are instructed that
16 you are not to reveal the standing of the jurors, that is
17 the split of the vote as to any verdict to anyone including
18 the Court at any time during your deliberations.

19 At this time, will counsel please approach
20 the bench.

21 (in the robing room.)

22 THE COURT: Mr. Thau, do you have any
23 exceptions to the charge?

24 MR. THAU: More a request for clarification
25 than an exception as such, your Honor.

1 1balk 263

2 You recall that when we reviewed the charge
3 earlier today, the ~~government~~ ^{Court} posed certain questions to
4 Mr. Siffert and that it was decided that the issue of
5 possession ended July 11, that is the day Yolanda put
6 the check through and in the context of the charge, I can
7 see some jurors thinking that they might consider the check
8 being in defendant's account as a possession on his
9 part.

10 I would request that that be clarified
11 and that possession in the sense of your charge is to be
12 considered only from the time of the taking by Yolanda
13 to the time of deposit, which is July 11, that is the
14 only request I have.

15 MR. SIFFERT: I think it is perfectly clear.

16 THE COURT: Let me see.

17 (Pause.)

18 THE COURT: I don't see the purpose of that
19 now, Mr. Thau.

20 MR. THAU: Can I tell you the danger that I
21 fear?

22 THE COURT: Yes.

23 MR. THAU: That is this: Some jurors may
24 say to themselves, well, he had a certain possession of
25 that check when it was in his account and he spent it.

1 H.H. - 266

2 It is clear that the possession we are
3 talking about is the almost hand possession, that is,
4 his possession of it constructively when Yolanda had it,
5 assuming he was her accomplice and the actual possession
6 when she said that he handed it to him for a moment.

7 The Government had an option here and I
8 played my defense, so to speak, based on what I understood
9 the Government all along to intend as a theory and that is
10 that the possession count involved from July 2 which is
11 when Yolanda took the check, to July 11, when she deposited
12 it, and in fairness it is not going to take that much
13 time or elaborate language to point it out to them, lest
14 they think that it involved a constructive possession while
15 the funds were in his account.

16 THE COURT: I think we went over that earlier
17 and the answer to that was yes.

18 MR. THAU: No, it was not.

19 THE COURT: It was.

20 MR. THAU: Yes, it is definitely no.

21 MR. SIFFERT: Your Honor instructed and
22 used the language check and what the proceeds are probative
23 of in use of the proceeds and your Honor was very clear
24 throughout the charge. I don't think it is necessary.

25 MR. THAU: Mr. Siffert has not answered your

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2 Honors' question. I think that is the most important
3 thing.

4 THE COURT: I think we went over that this
5 morning and I said are you talking about the physical
6 possession in her apartment when she said, "I handed the
7 check to him. He looked at it."

8 Then I said, "Are you saying that he possessed
9 it when he deposited it in his account?" And the
10 answer was yes I thought.

11 MR. THAU: Up through that point. That is
12 just the point I am making, not beyond it.

13 THE COURT: Why not?

14 MR. THAU: Beyond it --

15 THE COURT: If he deposited it in his account
16 and spent it that is not possession.

17 MR. THAU: The theory was the actual check
18 that counts, not the proceeds.

19 THE COURT: I never understood that, is that
20 right? You are standing there, I don't know. What is
21 the answer?

22 MR. SIFFERT: The answer is that Mr. Thau is
23 correct in the sense that the distribution of the proceeds
24 that we have been arguing, we have been talking about
25 possession of the check through deposit and the spending

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2 is probative that he had it with knowledge.

3 MR. THAU: We are talking now about the
4 actual count of possession.

5 THE COURT: We charged or I charged, rather,
6 as you requested, Mr. Thau, having in mind that should be
7 clarified. The main thing being that if he found in his
8 bank account some money which he spent, that alone is not
9 sufficient to convict him. I think that makes your
10 point that you are trying to urge now. I charged them as
11 to that.

12 MR. THAU: Yes, you did, I thank you.

13 THE COURT: That is the only point you could
14 be making is that they should be made to understand that
15 just the fact that he had this in his account, that it
16 somehow got in there, is not enough. They have to find
17 that he actually participated in the scheme; isn't that
18 what you are getting at?

19 MR. THAU: Yes.

20 THE COURT: All right, now what else do you
21 have?

22 MR. THAU: I have nothing else.

23 MR. SIEBERT: The only thing the Government
24 would ask is that your Honor reconsider with respect to
25 the charge on the defendant's testimony. Your Honor

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2 rarely alluded to the other consideration of other
3 witnesses without referring to his personal --

4 THE COURT: No, I never make that charge. I
5 charge as I indicated earlier that defendant's testimony
6 is to be judged in the same way as any other witness.

7 Anything else?

8 MR. WEAG: No, thank you.

9 MR. SIEFFERT: The point is that the accomplice
10 charge was very heavy in terms of the careful consideration
11 and the Court did not for example include the -- in
12 connection with the accomplice charge, the language that
13 the Government frequently must use such testimony because
14 otherwise it would be difficult or impossible to protect --

15 THE COURT: I think you made that point when
16 you said we don't call rabbis and priests to testify in
17 court, we have to deal with those we have.

18 All right, let's go.

19 (In open court.)

20 THE COURT: All right, ladies and gentlemen,
21 at this time we are going to excuse the alternate juror,
22 Mr. Gerald Wood. On behalf of the citizens of the
23 Southern District of New York, Mr. Wood, this Court thanks
24 you for your service on this jury. I am sorry that you
25 will not get an opportunity to deliberate with your fellow

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2 jurors after having sat through this trial, but I am afraid
3 that that is often the fate of alternate jurors, but I am
4 sure you realize that your service was essential in the
5 event that one of the regular jurors became incapacitated.
6 So you are excused now with the thanks of the Court.

7 Do you have anything in the jury room?

8 MR. WOOD: Yes, I do.

9 THE COURT: Well, please get it and leave be-
10 for the other jurors are brought in.

11 Thank you very much for your service.

12 I have good news for you, Mr. Wood. The
13 clerk says you have to report back Wednesday at nine
14 o'clock. They will hold your card.

15 (Pause.)

16 THE COURT: Now, as I announced earlier, ladies
17 and gentlemen, you will be taken to dinner now and brought
18 back and you may deliberate. At eleven o'clock we will
19 have limousines take you home and then you will return
20 tomorrow at noon, if necessary.

21 All right.

22 JUROR #3: Your Honor, may we make a call?

23 THE COURT: Yes, certainly, you may give the
24 number to the marshal.

25 I thought you did that earlier. Well, all right,

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2 you may give it to the marshal.

3 Now at this time, I will ask the clerk to
4 swear the marshals. The marshal will take you to dinner
5 and you will be in their custody until you reach a
6 verdict and if you want to make a call, give the number
7 to the marshal or he will let you make the call.

8 All right, swear the marshals.

9 (Marshals sworn by the clerk.)

10 THE CLERK: Marshals are sworn, your Honor.

11 THE COURT: All right.

12 (Jury taken out of the courtroom at seven p.m.)

CERTIFICATE OF SERVICE

FEB 25 , 1977

I certify that a copy of this [redacted] appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan H. Silberman